

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEX JENNINGS III,

Petitioner,

v.

K. SANTORO, Warden,

Respondent.

NO. EDCV 15-1185-GW (AGR)

ORDER TO SHOW CAUSE

Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired.

The court therefore orders Petitioner to show cause on or before **July 23, 2015** why the court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

I.

PROCEDURAL BACKGROUND

In 2012, a Riverside County jury convicted Petitioner of attempted premeditated murder and assault with a deadly weapon. The jury also found that he committed the crimes for the benefit of or at the direction of a street gang. (Petition at 2.) Petitioner was sentenced to 34 years to life. (*Id.*)

On December 10, 1993, the California Court of Appeal reversed the gang enhancement but otherwise affirmed the judgment. (Petition at 3); *People v. Jennings*, 2013 WL 6479851, *20 (2013). On March 12, 2014, the California Supreme Court denied review. (Petition at 3.) Petitioner did not file any habeas petitions in California. (*Id.*)

On June 11, 2015, Petitioner constructive filed the instant petition in this court. (Petition, Back of envelope.)

II.

STATUTE OF LIMITATIONS

The petition was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

The AEDPA contains a one-year statute of limitations for a petition for writ of habeas corpus filed in federal court by a person in custody pursuant to a judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts running on the latest of either the date when a conviction becomes final under 28 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

A. The Date on Which Conviction Became Final – § 2244(d)(1)(A)

Petitioner’s conviction became final on June 10, 2014, 90 days after the California Supreme Court denied review on March 12, 2014. See *Bowen v. Roe*,

1 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of limitations expired on June
2 10, 2015.

3 Absent tolling, the petition is late by one day.

4 **1. Statutory Tolling**

5 The statute of limitations is tolled during the time “a properly filed
6 application for State post-conviction or other collateral review with respect to the
7 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Petitioner is not
8 entitled to statutory tolling as he did not file any habeas petitions in California.

9 **2. Equitable Tolling**

10 “[T]he timeliness provision in the federal habeas corpus statute is subject to
11 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
12 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he
13 has been pursuing his rights diligently, and (2) that some extraordinary
14 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting
15 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
16 (2005)). “The diligence required for equitable tolling purposes is “reasonable
17 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation
18 marks omitted). The extraordinary circumstances must have been the cause of
19 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this
20 reason only when “extraordinary circumstances beyond a prisoner’s control
21 make it *impossible* to file a petition on time” and “the extraordinary
22 circumstances” were the *cause* of [the prisoner’s] untimeliness.” *Bills v. Clark*,
23 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in original).

24 There is no indication in the petition that Petitioner is entitled to equitable
25 tolling.

26 **B. Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)**

27 In the context of an ineffective assistance claim, the statute of limitations
28 may start to run on the date a petitioner discovered (or could have discovered)

1 the factual predicate for a claim that his counsel's performance was deficient, or
 2 on the date a petitioner discovered (or could have discovered) the factual
 3 predicate for prejudice, whichever is later. *See Hasan v. Galaza*, 254 F.3d 1150,
 4 1155 (9th Cir. 2001). Therefore, the statute of limitations begins to run on "the
 5 date on which the factual predicate of the claim or claims presented could have
 6 been discovered through the exercise of due diligence." 28 U.S.C. §
 7 2244(d)(1)(D). The statute starts to run when the petitioner knows or through
 8 diligence could discover the important facts, not when the petitioner recognizes
 9 their legal significance. *Hasan*, 254 F.3d at 1154 n.3.

10 Petitioner alleges his trial counsel was ineffective, but the factual bases for
 11 Petitioner's claim were known by him at the latest before he was sentenced.
 12 (See Petition at 10, 20.) Therefore, the date of discovery with respect to trial
 13 counsel does not assist Petitioner.¹

14 Petitioner also alleges his counsel was ineffective on direct appeal.
 15 (Petition at 24.) At the latest, Petitioner was aware of appellate counsel's alleged
 16 ineffectiveness when the California Court of Appeal issued its decision on
 17 December 10, 2013. Therefore, the date of discovery with respect to appellate
 18 counsel does not assist Petitioner.²

19 III.

20 ORDER TO SHOW CAUSE

21 IT IS THEREFORE ORDERED that on or before **July 23, 2015** Petitioner
 22 shall show cause why the court should not recommend dismissal of the petition
 23 based on expiration of the one-year statute of limitations.
 24
 25

26 ¹ Petitioner concedes his claim of ineffective assistance of trial counsel is
 27 unexhausted. (Petition at 13 & 20 *et seq.*)

28 ² Petitioner concedes that his claim of ineffective assistance of appellate
 counsel is unexhausted. (Petition at 20, 24.)

1 **If Petitioner fails to respond to this order to show cause by July 23,**
2 **2015, the court will recommend that the petition be dismissed with**
3 **prejudice**
4 **based on expiration of the one-year statute of limitations.**

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6
7 DATED: June 23, 2015



ALICIA G. ROSENBERG
United States Magistrate Judge